

D.P.U. 94-50

Petition of New England Telephone and Telegraph Company d/b/a
NYNEX for an Alternative Regulatory Plan for the Company's
Massachusetts intrastate telecommunications services.

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INTERLOCUTORY ORDER ON ATTORNEY GENERAL'S APPEAL
OF HEARING OFFICER'S RULING DENYING RECORD
REQUESTS OF ATTORNEY GENERAL AND NECTA

I. INTRODUCTION

On April 14, 1994, New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX" or "Company") filed with the Department of Public Utilities ("Department") documents described as revisions to its tariff, M.D.P.U. Mass. No. 10, for effect May 14, 1994, as part of an Alternative Regulatory Plan ("Plan") for NYNEX's Massachusetts intrastate operations. ¹ The matter was docketed as D.P.U. 94-50.

The instant interlocutory Order relates to an appeal, filed on July 27, 1994 by the Attorney General of the Commonwealth ("Attorney General"), of two Hearing Officer rulings. The Hearing Officer rulings sustained objections by NYNEX to record requests ² of the Attorney General and the New England Cable

¹ The Plan proposes a new form of regulation for NYNEX to replace the Department's existing rate-of-return regulation. Instead of continuing to regulate the Company's expenses, revenues, and earnings, the Department would only regulate the Company's prices, under a "price cap" form of alternative regulation. The "price cap" mechanism would allow the Company to change prices each year based on increases in inflation, less a pre-determined productivity factor, adjusted for exogenous cost changes.

² Record requests are a method by which the Department allows a witness to respond to cross-examination in writing, where fault of memory or complexity of subject matter so requires. See Section V., infra.

Television Association ("NECTA").^{3, 4} On August 8, 1994, NECTA filed comments on the Appeal ("NECTA Comments"). On August 10, 1994, NYNEX filed a Response to the Appeal ("NYNEX Response").

³ The record requests that are the subject of the Attorney General's Appeal are the following:

- (1) AG-RR-26, which asks NYNEX to provide a cash flow analysis relative to MCI IR-1-16 (marked for identification as Exh. AG-316), assuming no deployment of video dial tone;
- (2) AG-RR-27, which asks NYNEX to provide a sensitivity analysis on the percentage of customers who would potentially subscribe to video dial tone based on varying penetration rates of the expected deployment of 330,000 access lines;
- (3) AG-RR-31, which asks NYNEX to provide a Massachusetts-specific intrastate cash flow analysis, similar to that in Exh. AG-316;
- (4) AG-RR-35, which asks NYNEX to recalculate the "net present value" calculations and internal rate-of-return calculations on page 5 of Exh. AG-316, over a ten-year period;
- (5) NECTA-RR-6, which asks whether the broadband network described in NYNEX witness Mr. Killian's testimony is planned to be part of a larger broadband network for other jurisdictions served by the Company; and
- (6) An unnumbered NECTA record request, which asks the Company to provide NYNEX Corporation's Video Entertainment and Information Services Business Plan.

(Tr. 6, at 17, 18, 38, 48; Tr. 7, at 61, 87-88).

⁴ The Hearing Officer sustained the Company's objection to a third NECTA record request -- which seeks information as to whether the Company's video dial tone services will be subject to the Massachusetts sales tax on telecommunications (Tr. 7, at 64). That ruling was not the subject of the Attorney General's appeal.

No other parties commented. On August 12, 1994, the Attorney General filed a Reply to NYNEX's Response ("Attorney General Reply").

On September 14, 1994, the Hearing Officer denied NECTA's request for him to reconsider his ruling sustaining the Company's objection to the NECTA's unnumbered record request that sought a copy of NYNEX Corporation's ⁵ Video Entertainment and Information Services Business Plan. See September 14, 1994 Hearing Officer Ruling on NECTA Motion for Reconsideration at 8. Notwithstanding the ruling, the Hearing Officer required the Company to provide the Department with a copy of the Video Entertainment and Information Services Business Plan for in camera inspection "to confirm that the Company's representations [that the document does not contain relevant information] are correct." Id. The Company provided the Hearing Officers with a copy of the document on September 15, 1994, as required. After reviewing the document, the Hearing Officer issued a Notice to Parties on September 16, 1994, stating that the in camera inspection confirmed the Company's representations that the document did not contain information relevant to a material issue in this proceeding.

II. HEARING OFFICER RULINGS

⁵ For purposes of this Order, we refer to NYNEX's parent company as NYNEX Corporation.

The Hearing Officer rulings were made during evidentiary hearings on July 18-20, 1994. Prior to the rulings, the Hearing Officer allowed parties substantial opportunity to argue their case. See Trs. 6, at 49-62; 7, at 61-64, 87-90, 135-150. ⁶

At the July 18th hearing, with respect to Attorney General Record Requests Nos. 26, 27, 31, and 35, the Hearing Officer stated:

The record requests at issue ... are being objected to on relevancy grounds. They seek information on cost analyses relating to the Company's broadband deployment, which the Attorney General contends will allow [him] and the Department to determine if these investments are in the best interests of Massachusetts ratepayers and thereby help to determine whether the [P]lan is reasonable and appropriate. The Company has not asked the [D]epartment, nor does the [D]epartment intend, to approve the Company's investments in its proposed broadband network, as part of this proceeding or under the [P]lan. It is worth noting also that the [D]epartment does not conduct pre-approval of investments under rate-of-return regulation. Therefore, the record requests that are being objected to ... are not relevant to this proceeding.

⁶ The one exception was the Hearing Officer's decision to allow only the Attorney General to respond to the Company's objections to his four record requests made during the July 18, 1994 hearing (see Tr. 6, at 55). NECTA had requested to be heard on the Company's objection, and after the Hearing Officer sustained the Company's objection to the record requests, NECTA protested that its "rights have been substantially prejudiced by not being afforded an opportunity to be heard on this issue" (Tr. 6, at 63). As a result of NECTA's protestation, the Hearing Officer indicated that NECTA could respond then on the record or at a later time, and that the Hearing Officer would consider NECTA's arguments in deciding if reconsideration was warranted. At the July 19, 1994 hearing, NECTA commented on the relevance of the contested Attorney General record requests (Tr. 7, at 144-147).

Accordingly, I grant the Company's motion to strike those record requests. For the same reasons, I find that it's not necessary for the Company to offer another witness to testify to the specifics of the Company's business plan related to the cost details of broadband deployment, and therefore deny the Attorney General's request.

Tr. 6, at 61-63.

Immediately following the ruling, the Attorney General made a request on the record for reconsideration (id. at 65-72). After considering arguments from the Attorney General and NYNEX, the Hearing Officer affirmed his ruling (id. at 76).

At the July 19th hearing, with respect to NECTA Request No. 6, the Hearing Officer stated that he did not "find NECTA's arguments regarding the relevance of [this] record request[] to be persuasive" and sustained the Company's objection (Tr. 7 at 64).

At the July 20th, 1994 hearing, with respect to NECTA's unnumbered record request that sought a copy of NYNEX Corporation's video programming and entertainment services marketing plan, the Hearing Officer ruled:

Based on the evidence to date and arguments of the parties, I rule that NECTA has not demonstrated the particular relevance of its record request. The links that NECTA and the Attorney General sought to make between the company's plan for alternative regulation and the requested document are tenuous at best. Therefore, I sustain the company's objection.

Tr. 8, at 118.

III. POSITIONS OF THE PARTIES

A. Attorney General

The Attorney General argues that these record requests seek information that is "clearly relevant" to the issue of the reasonableness of the Plan, and to the specific issues of the Plan's effect on captive customers and on the development of effective competition on the "emerging 'video services' market" (Attorney General Appeal, at 1-2). As relief, the Attorney General asks that the Department reverse the Hearing Officer's rulings and order NYNEX to respond to the record requests (id. at 2).

The Attorney General argues that the Hearing Officer's rulings that the record requests were not relevant to this proceeding reflects a misunderstanding of the grounds that support the information requested (id.). The Attorney General states that he is not requesting that the Department "pre-approve" NYNEX's broadband investment or any other investment commitment contained in the Company's Plan, but rather seeks the information so that the Department can "assess whether approval of NET's Plan would be in the public interest" (id. at 3). The propriety of the investments, he contends, would be "one factor weighed in the overall determination of the reasonableness of" NYNEX's Plan (id. at 8).⁷

⁷ The Attorney General states that in arguing for these record requests during the evidentiary hearings, he was asking the Department to consider the reasonableness and

The Attorney General maintains that NYNEX put the reasonableness of its proposed infrastructure investments at issue by "linking" Department approval of the Plan with the Company's willingness to make certain investments (id. at 3).⁸

Moreover, the Attorney General contends that the proposed deployment of a broadband network is "definitely a component of the Company's direct case" (Attorney General Reply at 1 (citation omitted)). He claims that the Company has conditioned its "investment commitments," including the broadband deployment, on Department adoption of the Plan and that such has been stated by NYNEX's witness Mr. Killian in his testimony (id. at 1-2).

The Attorney General argues that the contested record requests may help in determining whether approval of the

cost-effectiveness of this and other NYNEX investment commitments in determining whether the Plan is reasonable and whether it should be adopted (Attorney General Appeal at 2, n.5). The Attorney General also contended that he had argued that the record requests were relevant, assuming the Department adopts an earnings sharing mechanism with the Plan, because to the extent that NYNEX makes investments that are not cost-effective, the cost of those investments should be removed from the rate base prior to any earnings calculation (id.). In addition, the Attorney General argued that he sought to make the Department aware of the potential through the Plan's proposed pricing rules for NYNEX to cross-subsidize video service rates with telephone rates, which could result in anti-competitive video service prices (id.).

⁸ The Attorney General argues that the Company has testified that its ability to deploy a broadband network and the acceleration of certain investments depends on adoption of the Plan (Attorney General Appeal at 3).

Company's Plan is in the public interest, by answering two important questions: (1) whether approval of the Plan, as a precondition for NYNEX to proceed with broadband deployment, is justified, if the investments are economic without subsidy from current telephone ratepayers; and (2) whether approval of the Plan would give NYNEX the freedom to engage in anti-competitive cross-subsidization (Attorney General Appeal at 3-4).⁹ He also argues that because the Company's Plan contemplates no review of cost data to determine whether prices for new tariffed services cover incremental costs, it is crucial that parties have an opportunity at this time to pursue the issue of "video-related" cross-subsidization (id. at 6). Moreover, the Attorney General asserts that even with "an FCC determination of appropriate cost allocation . . . between intrastate telephone and interstate video services," under the pricing rules in the Company's proposed Plan, NYNEX could engage in cross-subsidization of any

⁹ The Attorney General contends that because the Plan "would provide the Company with nearly complete pricing flexibility to determine prices for the next 10 years, the potential would exist for NYNEX to use revenues from telephone services to subsidize the Company's video services, and as result, engage in anti-competitive pricing of its video services (Attorney General Appeal at 4-5). He maintains that "[g]iven NET's ability . . . to increase prices on less-competitive services and decrease prices on competitive services, approval of its Plan may give the Company the power to price competitors out of the competitive market place, and almost certainly would give the Company the power to adversely affect the development of effective competition. NET's anti-competitive pricing power . . . also could harm future economic development in Massachusetts" (id. at 6).

future "video dial tone offerings," absent meaningful safeguards imposed by the Department at this time (id. at 7) (sic).

According to the Attorney General, the issue of who pays for these investments and who receives the benefits of these investments is also "extremely important" because many of the investment commitments involve the installation of common use infrastructure which may be used for both telephone and video services (id.).¹⁰

The Attorney General also argues that consistent with the Department's June 14th Order on Scope in this proceeding, the contested record requests will help the Attorney General and NECTA determine if the Company's Plan should be modified or rejected (id. at 8).

Finally, the Attorney General states that under the broad standard for discovery in Massachusetts, the contested record requests are "clearly discoverable because they are relevant to both the specific infrastructure issue raised in NET's direct case, and to the broad central issue of this case, the propriety of NET's proposed Plan" (Attorney General Reply at 2, citing Mass. R. Civ. P. 26).

B. NECTA

¹⁰ The Attorney General suggests that evidence to date shows that broadband (i.e., video dial tone services) is not necessary to provide telephone service, and that NYNEX has indicated an interest in offering video programming (Attorney General Appeal at 4).

In supporting the Attorney General's appeal, NECTA argues that "[w]hether the broadband network deployment of NYNEX should be accepted by the Department as a factual basis for finding in favor of the Plan has been placed at issue by the Company" (NECTA Comments at 2). ¹¹ NECTA maintains that whether NYNEX's broadband investment "makes any economic sense" is relevant to the merits of NYNEX's direct case assertion "that the promise of broadband justifies a change in the mode of telephone regulation" (id.).

NECTA also argues that because NYNEX incorrectly included more than \$500,000 in video dial tone trial costs in its 1993 intrastate operating results, determination of NYNEX's revenue requirement requires "close scrutiny" to determine if other video-related costs have been included in the Company's intrastate operating results (id., citing Exh. NECTA-111). NECTA asserts that review of the broadband cost/benefit analysis and its underlying assumptions will enable the Department to "better safeguard" both telephone ratepayers and cable operators from excessive telephone rates and predatory pricing of video services, respectively (id. at 2-3).

NECTA argues that since the Company's rate-of-return is an issue in this case, and NYNEX has incurred broadband-related

¹¹ NECTA contends that "NYNEX clearly has used its broadband network deployment plan as an inducement for the Department's approval of the NYNEX Plan" (NECTA Comments at 1-2).

costs without approval of its Plan, the Attorney General's record requests are relevant to rate-of-return issues, such as "the degree of risk arising out of Company investment decisions" (id.).¹²

C. NYNEX

NYNEX argues that neither NECTA nor the Attorney General has demonstrated the relevance of the record requests or any nexus between those requests and the issues in this case (NYNEX Response at 2). Therefore, NYNEX argues that the Department should deny the Attorney General's appeal and affirm the Hearing Officer's rulings (id. at 3).

NYNEX argues that the Attorney General's appeal proceeds from the "false premise" that the Company's planned investments in a broadband network are before the Department for decision in this case (id. at 7). The Company states that its proposed investments are "voluntary commitments" made to demonstrate the Company's commitment to invest in its Massachusetts network (id., citing Tr. 6, at 32, 61-62).

NYNEX asserts that the contested record requests are not relevant for several reasons: (1) video dial tone is subject to regulation by the Federal Communications Commission ("FCC"), and the reasonableness of the video dial tone proposal and cost

¹² According to NECTA, whether the Company's proposed broadband deployment is "cost justified" is relevant to risks underlying NYNEX's rate of return (NECTA Comments at 4).

allocation rules will be determined by the FCC and are beyond the Department's jurisdiction and the scope of issues in this case;¹³

(2) contrary to the Attorney General's statement, parties can challenge a Company's filing for new services pursuant to Section 4.C(4)(5) of the Company's Plan; (3) the Attorney General has drawn no nexus between the subject record requests and his allegations of anti-competitive conduct and cross-subsidization;¹⁴ and (4) the Attorney General's suggestion that the prudence of the investment in a broadband network should be considered by the Department is "fallacious" (id. at 7-9).

In response to NECTA's arguments concerning the Company's video programming business plan, NYNEX maintains that the "highly confidential" document "is not before the Department in this case

¹³ The Company claims that, for example, the record request asking the Company to perform calculations on potential subscribers to video dial tone service -- AG-RR-27 -- relates to the reasonableness of the Company's video dial tone proposal and/or the rules governing the allocation of investment and cost of the service (NYNEX Response at 8). Therefore, the Company argues that the record requests are beyond the scope of the Department's jurisdiction and scope of this proceeding (id.). Moreover, NYNEX contends that a response to AG-RR-26, AG-RR-27 and AG-RR-31 would be "unduly burdensome" in that it would require the Company to prepare calculations and analyses that do not currently exist (id.).

¹⁴ NYNEX claims that the Attorney General has not demonstrated with factual support how the information requested would "alleviate concerns with anti-competitive conduct, cross-subsidization and charges to captive ratepayers" (NYNEX Response at 8). In addition, the Company argues that the Attorney General has overlooked the Alternative Regulatory Plan's "safeguards" (id. at 9).

nor is it reasonably related to any of the issues in this case" (id. at 3).¹⁵ Contrary to NECTA's assertion, NYNEX claims that since the video programming business plan is a marketing analysis, it will not help NECTA in its determination of whether any of the Company's test period expenses are associated with the video entertainment and information services business (id. at 3-4).

NYNEX also contends that NECTA has failed to demonstrated how the video programming business plan would shed light on issues of cross-subsidization (id. at 4). The Company maintains that all costs associated with entertainment and information services are not being charged, allocated, or assigned to the NYNEX's Massachusetts operations but rather are incurred by the Company's parent corporation (id.). In addition, the Company notes that "a comprehensive system of cost allocation rules and cost accounting safeguards currently exist at the federal level" to prevent cross-subsidization between regulated and unregulated services (id.).¹⁶

¹⁵ NYNEX asserts that NECTA's true motive for seeking this document is to obtain a "highly confidential business plan of a future potential competitor" (NYNEX Response at 6).

¹⁶ NYNEX also cites a recent FCC ruling that indicated that providers of video dial tone services would be required to charge rates that covered the direct costs for interstate services and that providers would need to keep subsidiary accounting records to record revenues, investments, and expenses associated with the service (NYNEX Response at 5, (continued...))

NYNEX also disputes NECTA's contention that the deployment of a broadband network in Massachusetts is a specific component of the Company's Plan (id. at 6). According to the Company, the investment commitments proposed by the Company "signify the Company's firm intent to continue to invest in Massachusetts under price regulation" (id.). Moreover, NYNEX asserts that NECTA is wrong in contending that the deployment of the broadband network can not be made without some financial support from video programming (id. at 5-6, citing Exh. AG-316).

(...continued)

citing Application of New Jersey Bell Telephone Company,
File No. W-P-C-6840, Order and Authorization released July
18, 1994, ¶¶ 42-43).

IV. STANDARD OF REVIEW

The Department's Procedural Rules state that the hearing officer "shall make all decisions regarding the admission or exclusion of evidence ... in the course of the hearing." 220 C.M.R. § 1.06(6)(a).

The State Administrative Procedure Act provides that "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G.L. c. 30A, § 11(2); see also Town of Framingham v. Department of Public Utilities, 355 Mass. 138, 144 (1969). Except in matters of privilege, however, administrative agencies "need not observe the rules of evidence observed by courts." G.L. c. 30A, § 11(2); Boston Gas Company, D.P.U. 88-67 (Phase I), at 15 et seq. (1988).

With regard to the legal standard for relevance, the Supreme Judicial Court has stated:

As a general rule the parties to an action have a right to show all material facts In determining whether evidence offered serves any valid purpose we apply the rule that it must merely render the desired inference more probable than it would be without the evidence We are influenced by the general view that relevant evidence should be admitted unless there is a quite satisfactory reason for excluding it

Green v. Richmond, 369 Mass. 47, 59 (1975) (citations omitted). ¹⁷

¹⁷ Although the Department is not bound by judicial rules of evidence, we find this standard instructive.

V. ANALYSIS AND FINDINGS

The issue before us is whether the Hearing Officer acted correctly in sustaining objection to the contested record requests and, thereby, excluding responsive information from the evidentiary record in this proceeding.¹⁸ Pursuant to the above standard of review, we must determine whether the information sought by the record requests is relevant to a material issue in this proceeding. For the reasons cited below, we find that the information is not relevant for it would not tend to prove facts of consequence to issues material to the investigation.

As noted previously, the four contested Attorney General record requests relate specifically to a confidential document of NYNEX Corporation, entitled "Broadband Network Deployment Plan."¹⁹ This document sets forth the planning and operational steps for the Company's decision to deploy an integrated switched

¹⁸ As noted later in this section, in this proceeding responses to record requests are part of the evidentiary record. See Ground Rule No. 3 (issued May 19, 1994; revised August 18, 1994).

¹⁹ This document was attached to the Company's response to MCI information request 1-16, which had asked the Company to "provide the cost estimate to NET of providing the broadband capability to the 330,000 access lines ... and all workpapers, source documents, or other material used to determine the cost estimate." The "Broadband Network Deployment Plan" apparently was provided by the Company as a source document for its cost estimate of providing broadband capability to 330,000 access lines in Massachusetts. The information response was marked for identification as Attorney General Exh-316.

broadband network. Specifically, the document "specifies the technologies, geographic deployment sequence, and operational deployment plan for a switched broadband network . . . [and] details the costs, capital and expense requirements, and financial impact of the network deployment." Each of the Attorney's General's record requests asks the Company to provide new financial or sensitivity analyses or recalculations, given different assumptions, timing or geographic considerations, relative to the Company's broadband deployment and the provision of video dial tone services over the broadband network.

The two contested NECTA record requests ²⁰ also seek

²⁰ Although the issue of the Attorney General's standing to appeal the Hearing Officer's denial of NECTA's record requests was not raised by NYNEX in its Response, it is a matter that deserves some mention. Pursuant to G.L. c. 25, § 5, an "aggrieved party in interest" may appeal a final decision of the Department. However, there is no statutory provision or regulation that squarely addresses the question of whether a party may appeal a hearing officer's ruling denying a motion or request of another party. In Save the Bay, Inc. v. Department of Public Utilities, 366 Mass. 667, 672 (1975), the Supreme Judicial Court held that within the context of a judicial appeal from an administrative order, "appropriate limitations could properly be placed on those persons allowed" to appeal. The Court stated:

Only where the parties have demonstrated the required participation in the administrative proceeding and have presented an orderly record before the agency have they properly preserved their appellate rights.

Id.

We think the same requirements should apply to appeals of
(continued...)

information about the Company's proposed deployment of a broadband network in Massachusetts. NECTA Record Request No. 6 seeks confirmation of whether the Company's broadband network would be part of a larger NYNEX regional network. The unnumbered NECTA record request asks for a highly-confidential Video Entertainment and Information Services Business Plan of NYNEX Corporation.

The evidentiary dispute surrounding these record requests primarily relates to a difference in opinion among the parties as to whether the reasonableness of the Company's investment commitments ²¹ is an issue in this proceeding. The Company argues that the reasonableness of its investment commitments is not an

(...continued)

hearing officer rulings. In the instant proceeding, the Attorney General demonstrated the "required participation" by raising arguments on the record in support of NECTA's record requests. See Tr. 7, at 61-64, 87-90, 135-150. Therefore, the Hearing Officer's ruling was adverse to the Attorney General's position. Accordingly, we find that the Attorney General has standing to appeal the Hearing Officer's ruling relating to NECTA record requests.

²¹ The Company's investment commitments, as discussed in its direct case, include broadband network deployment and certain infrastructure improvements in the Massachusetts public telecommunications network, such as complete central office conversion, complete statewide deployment of System Signaling #7, near complete deployment of AIN, and complete interoffice fiber deployment, by year-end 1998. Alternative Regulation Plan, Attachment A at 22-23; Prefiled Testimony of John F. Killian, at 17 (marked for identification as Exhs. NYNEX-1, 8, respectively).

issue; the Attorney General and NECTA argue otherwise.²² For the reasons cited below, we determine that the reasonableness of the Company's investment commitments is not an issue in this proceeding, and, therefore, the information sought through the contested record requests is not relevant to a material issue.

In the Department's June 14, 1994 Interlocutory Order, we found that only the issues of the "scope and timing" of the Company's infrastructure improvements (i.e., investment commitments) were within the scope of this proceeding. June 14th Interlocutory Order, at 22-23. The Department did not state or imply that the reasonableness of the Company's infrastructure investments would be an issue in this case.²³ We find that none of the six contested record requests reasonably relates to the scope or timing of the Company's infrastructure improvements.²⁴

²² We note that the Attorney General has drawn a distinction between asking for "pre-approval" and for a finding on the reasonableness of the investments (see discussion, infra this Section).

²³ We note that in our June 14th Interlocutory Order, the Department did recognize that there might be other issues not specifically enumerated in the Company's Motion on Scope that would be determined by the Department to be within the scope of the investigation. June 14th Interlocutory Order, at 23, n.19.

²⁴ The cash-flow, financial, and sensitivity analyses sought by the Attorney General's Record Requests Nos. 26, 27, 31, and 35 go far beyond the cost of broadband deployment in Massachusetts (which NYNEX provided in AG Exh-316), and, thus, do not reasonably relate to the issues of the scope and timing of the Company's infrastructure investments.

(continued...)

Indeed, neither the Attorney General nor NECTA argues that the record requests relate to the issues of the scope and timing of the Company's investment commitments.

Instead, the Attorney General and NECTA have argued that the record requests relate to the reasonableness of the Company's investments. According to the Attorney General and NECTA, the reasonableness (or cost-effectiveness) of these investments has been made an issue in this proceeding because the Company has "linked" its commitment to make the investments to approval of its Plan by the Department.

Although the Company's Plan and direct case have discussed the investment commitments, the commitments themselves are not part of the actual alternative regulatory methodology (i.e., the pricing rules, term, and other components of the alternative regulation scheme) for which the Department must make a determination of reasonableness in the final order in this

(...continued)

Instead, they relate to the issue of the reasonableness or cost-effectiveness of the Company's investment commitments (see discussion infra). NECTA's Record Request No. 6, which asks whether the Company's broadband network in Massachusetts would be part of a regional NYNEX broadband network, seeks information about the scope of NYNEX Corporation's broadband deployment plans, not the scope of broadband deployment by the Company in Massachusetts. Finally, NYNEX Corporation's marketing plan for its possible entry into the video programming services business (which is the subject of NECTA's unnumbered record request) also does not relate to the scope and timing of the Company's infrastructure improvements.

proceeding. According to the Company, it included the infrastructure improvements in its Plan to demonstrate NYNEX's strong intent to invest in the Massachusetts public telecommunications network under an alternative regulation scheme. The manner in which the Company has described its investment commitments in its Plan and direct case is consistent with this characterization. Moreover, as the Hearing Officer noted, the Company has testified that it is not seeking Department approval of these investments either as part of this docket or at some later time in accordance with the Plan. While alternative regulation, according to the Company, would increase the Company's ability to make infrastructure improvements, and in this narrow sense creates a "link" between the investments and Department approval of the Company's Plan, this is not a compelling justification for use to consider the reasonableness of the investments.

Although the Company is not requesting that the Department make findings regarding the reasonableness of its investment commitments, the Attorney General argues that the Department should judge the reasonableness of the investments in this proceeding in case the Department approves an earnings sharing mechanism for the Plan. To the extent that the investments are not cost-effective, the Attorney General asserts that the cost of the investments should be removed from the calculation of the

Company's earnings for purposes of earnings sharing. Particularly in the rapidly evolving telecommunications industry, we do not believe that it would be appropriate for the Department to determine whether a given prospective investment is reasonable.²⁵ We note that parties in this case will have an opportunity to argue for the adoption of an earnings sharing mechanism for the Plan. Such a mechanism could allow for a prudence review of the Company's actual investments in the context of determining the Company's earnings.

For all of the above grounds, it would be incongruent for us to judge the reasonableness of the Company's investment commitments. Therefore, we reaffirm our previous determination that, as regards the Company's infrastructure improvements, only the issues of the scope and timing of those infrastructure improvements are permissible areas of inquiry in this proceeding. The disallowed record requests seek to pursue matters related to the Company's investment commitments that are outside the stated scope of this proceeding and, therefore, are of no direct relevance to the investigation of the Company's petition.

The Attorney General and NECTA also argue that the record requests are relevant to issues of anti-competitive conduct,

²⁵ The Department also does not intend in this proceeding to determine whether any future common costs associated with video dial tone service and allocated to the intrastate jurisdiction should be included as part of NYNEX's intrastate revenue requirement.

cross-subsidization, and charges to captive ratepayers -- issues which they say are material to this investigation. Issues of anti-competitive conduct and cross-subsidization are clearly material to this case. However, the requested cost/benefit and sensitivity analyses, the Company's marketing plan for its potential video services business, and the information requested in NECTA's sixth record request, are not relevant since they would not tend to prove facts of consequence to the issues material to this proceeding (e.g., misallocation of video-related costs to the Company's intrastate operating results). ²⁶

Moreover, video dial tone service is subject to exclusive regulation by the Federal Communications Commission ("FCC"). In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd. 5781, 5820 (1992). The FCC has in place a comprehensive system of cost allocation rules and cost accounting safeguards to protect against cross-subsidization between regulated and unregulated services. Id. at 5827-29. In addition, the FCC will "ensure that the risk of anticompetitive conduct is minimized" when it reviews local telephone companies' specific video dial tone proposals in connection with the Section 214 certification process. Id. at

²⁶ We note that the Hearing Officer has reviewed NYNEX's Video Entertainment and Information Services Business Plan and confirmed that it contained no relevant information. See September 16, 1994 Hearing Officer Notice.

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NECTA also has argued that the information sought by the record requests is relevant to rate-of-return issues. Rate-of-return issues clearly are material to this case. However, NECTA has not shown how the information sought by the Attorney General's request for the Company to redo the cost/benefit and sensitivity analyses under different assumptions is relevant to investor perception of the Company's investment risk. Although a utility's particular capital projects may have some effect on investors' perceptions of the Company's financial risk, generally there is no strong link between a particular capital project and that perception of investment risk. Given this limited nexus between the cost-effectiveness of the Company's investment commitments and investors' perceptions of the Company's investment risk, we find that the information sought by the Attorney General and NECTA would not tend to prove facts of consequence to issues material to this proceeding.

Finally, the Attorney General suggests that the broad discovery standard for administrative proceedings permits him to obtain the information he seeks. In matters of pre-hearing discovery, the Department is instructed rather than controlled by the broad standards of Mass. R. Civ. P. 26 et seq. See 220 C.M.R. 1.06(c)(2). Under that standard, no objection would lie to seeking information that is irrelevant and therefore

inadmissible, provided it is "reasonably calculated" to lead to the discovery of admissible evidence. Certainly, in this docket, discovery has been extensive, consistent with the tenor of Mass. R. Civ. P. 26(b)(1). But the broad standard for discovery in Mass. R. Civ. P. 26(b)(1) does not apply to record requests in Department investigations. Record responses in this proceeding are sworn, written testimony that are part of the evidentiary record. See Ground Rule No. 3 (issued May 19, 1994; revised August 18, 1994).²⁷ Record requests are not a proper substitute for discovery. Id. Seeking the information described by the record requests might well have been permissible during pre-hearing discovery.²⁸ But, at this late juncture, the instant record requests are procedurally unfair. Thus, the Hearing Officer could have sustained the Company's objection to the contested record requests on the additional ground that they

²⁷ As stated in the Ground Rule No. 3: "Responses to record requests are written substitutes to oral answers where fault of memory or complexity of subject precludes a responsive answer by the witness in the hearing. Record requests shall not be used as a substitute for discovery or as a substitute for re-direct examination." (emphasis added) (Ground Rule No. 3).

²⁸ We note that NECTA did ask for the NYNEX Corporation Entertainment and Information Services Business Plan during the discovery phase of this proceeding, but the Company objected to the request "on the grounds that it [was] irrelevant, immaterial and not reasonably calculated to lead to the discovery of admissible evidence" (NECTA Information Requests 4-2 and 4-3, marked for identification as Exhs. NECTA-87 and NECTA-88). NECTA did not compel production of these requests.

constituted untimely discovery.

Accordingly, for the above reasons, we find that the the Attorney General's Record Requests Nos. 26, 27, 31, and 35, NECTA's Record Request No. 6, and NECTA's unnumbered record request seeking NYNEX Corporation's Video Entertainment and Information Services Business Plan, are not relevant to a material issue in this proceeding. Therefore, we affirm the Hearing Officer's rulings excluding these record requests, and deny the Appeal of the Attorney General.

VI. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Appeal of the Attorney General of the
Hearing Officer Ruling, filed with the Department on July 27,
1994, be and hereby is DENIED.

By Order of the Department,

Kenneth Gordon
Chairman

Barbara Kates-Garnick
Commissioner

Mary Clark Webster
Commissioner